SUPREME COURT, U. S.
Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 865

THE NEW YORK CENTRAL DEVELOPMENT CORPORATION, A DELAWARE CORPORATION, AND JONES & LAUGHLIN STEEL CORPORATION, A PENNSYLVANIA CORPORATION,

Plaintiffs-Respondents,

vs.

EDWARD J. BYCZYNSKI AND HELENA S. BYCZYNSKI,

Defendants-Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

D. ROBERT THOMAS,
JAMES W. KISSEL,
11 South La Salle Street,
Chicago, Illinois 60603,
Attorneys for Respondents.

Of Counsel:
SIDLEY & AUSTIN,
11 South La Salle Street,
Chicago, Illinois 60603.

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QUESTION PRESENTED.

This case involves the interpretation of one particular clause in a contract for the sale of farm land under one particular factual situation. That clause had been insisted upon and drafted by the attorney for the sellers. Its operation, purpose and effect had been discussed by him with representatives of the purchaser (A. 28-31). The attorney then told his clients what the purpose and effect of the clause was and how it could be put into operation (A. 31-32). In the words of the Petition for Certiorari (p. 3), regarding the disputed evidence, the attorney

"allegedly told them shortly before the contract was executed that it was their obligation to locate the desired exchange property and that the purchaser, respondents herein, would not make any attempt to locate it." In the courts below, the sellers (petitioners herein) sought to exclude the attorney's testimony that he had informed them of his discussion and agreement with respondents as to how his clause would operate and its purpose and effect.

No communication to an attorney is involved in this petition. The dispute concerns merely the communication of information to the sellers which their attorney had already discussed with the representatives of the purchaser. The sellers were represented throughout the litigation below by attorneys different from the attorney who had represented them in the negotiations for the sale of the property.

The question presented is: Did the court below deny petitioners the right to the aid of counsel at the trial of this civil lawsuit when the court held that testimony as to a non-confidential statement by an attorney to his clients of information previously discussed by him with the other party was not privileged against disclosure?

STATEMENT OF THE CASE.

The Statement of the Case contained in the Petition filed herein omits some of the facts and is misleading as to others. Here briefly is what happened in somewhat more detail than the Illinois Appellate Court deemed necessary to its decision.

The New York Central Development Corporation, acting for itself and for Jones & Laughlin Steel Corporation, plaintiffs-respondents herein, obtained options on a number of parcels of real property in Putnam County, Illinois (A.

33), as a site for a steel plant. As part of this acquisition, defendants-petitioners contracted to sell 370 acres of pasture and crop land to plaintiffs for $298,400 by an Option dated November 19, 1964 (Pl. Ex. 4, A. 56, R. 110). When the terms of this contract were negotiated, defendants' attorney, Walter Boyle, insisted upon a clause allowing for a possible exchange of property to permit defendants to avoid present payment of any capital gains tax if defendants so desired (A. 30, 34). Defendants' attorney drafted language for such an exchange property clause and added such language by typewriter onto the mimeographed form of Option Contract used by plaintiffs (A. 28, 35). This language is:

> C. "... The conveyance of above premises is conditioned upon conveyance of suitable exchange property to Seller. Seller will sell only if suitable exchange property cannot be acquired by purchaser" (A. 6).

Subsequently defendants claimed this Option had an error because on their copy the words "per acre" had not been stricken at the place the total price of $298,400 was shown. Defendants then demanded more money and other concessions (A. 50). On February 16, 1965, plaintiffs agreed to increase the price to $330,000 plus other concessions (A. 52). The first Option was torn up and a second Option was signed (Pl. Ex. 1, A. 4, R. 24) with the identical clause for exchange property included (A. 33).

The words used by defendants' attorney in that clause were not clear as to whether the defendants or the plaintiffs had the task of locating "suitable exchange property," in the event defendants wanted an exchange. However, from the time the contract was signed until just before the date set for closing, the correspondence between the parties (A. 59, 60, 54) and the activity of the defendants (A. 52) indicate that both plaintiffs and defendants inter-

preted the contract as requiring defendants to locate exchange property suitable to defendants in price, location, size, and topography, if defendants wanted to receive other property as all or part of the price for their 370 acres.

This also was the understanding of the parties, as related by defendants' attorney (A. 32), and was in accord with his instructions, and an agreement he secured from plaintiffs (A. 30) that the plaintiffs were not to go around looking for exchange property since such activity would only serve to increase the price because of plaintiffs' corporate identities (A. 30). In fact, defendants spent considerable time looking at and negotiating for exchange property they deemed suitable. As soon as the news got out that plaintiffs had exercised the Options to purchase the land from Mr. and Mrs. Byczynski, and from their neighbors, 40 to 50 real estate people came out to talk about exchange property with Mr. Byczynski (A. 24, 25, 39). Mr. Byczynski, in turn, went out and talked with 7 or 8 real estate brokers and looked at property with them, looking for "exchange property for tax purposes" (A. 52). Mr. Byczynski followed up this search by making offers to try to purchase three of these farms (A. 52).

Plaintiffs exercised their option to complete the purchase of the Byczynski property on September 14, 1965 (A. 2, 8) and the closing was set for November 15, 1965. However, on September 16, 1965, Mr. Byczynski told plaintiffs that 60 days was not enough time for him to locate exchange property and he sought to have the closing date extended from November 15, 1965, to March 1, 1966 (A. 42). When plaintiffs declined this and other demands, defendants refused to appear at the closing (A. 47) and have refused to perform in accord with their contract.

Plaintiffs had previously paid defendants $33,000 as a down payment on the purchase price (A. 2, 4) and thereupon brought this action to require defendants to convey

the 370 acres in question for the fixed price of $330,000 (less the $33,000 already paid) and under the terms of the contract (A. 4, 5, 6, 7) signed by defendants.

THE WRIT SHOULD NOT BE GRANTED.

I.

There Was No Denial of Any "Privileged Communications" Rule Between Attorney and Client. The Court Found Factually That the Communications Did Not Originate in Confidence, But Rather Were Intended to Be Disclosed, and Thus Fell Within the Recognized Exception to the Attorney-Client Privilege.

The decision in this case involves the interpretation of one clause in one contract for the sale of farm land under factual circumstances which hardly could recur.

The opinion does not conflict with other decisions. Instead, it follows legal principles long accepted in Illinois, in other states and in the federal courts.

When petitioners claim a violation of a constitutional privilege, they really ask this Court to ignore the facts of this controversy and to forget the many decisions in Illinois and elsewhere which are directly in point to show there was no privilege involved here but rather a well-recognized exception to the limited rule of privilege.

The petition indicates (at page 2) that petitioners sought an appeal to the Illinois Supreme Court as a matter of right. Petitioners neglect to state they also asked that Court for an appeal under the Court's discretionary power. They made this same constitutional argument seeking such appeals and were turned down in each instance for the good reason that their argument is spurious and without

substance. They were not denied counsel in any instance. There was no hearing or proceeding in this entire controversy at which petitioners were not represented.

Despite their argument, one notes that petitioners do not say they ever lacked counsel. Instead petitioners really argue their counsel should not be permitted to speak the truth concerning a discussion between that attorney and respondents which the attorney then relayed to petitioners. There is hardly a constitutional question here.

The California appellate case *Prudential Ins. Co.* v. *Small Claims Court*, 173 P. 2d 38 (Dist. Court of Appeal, First Dist., Division 1, Calif., 1946) and *Miranda* v. *Arizona*, 384 U. S. 436 (1966), mentioned at pages 14-15 of the Petition have no application, even remote, to this *civil* proceeding. Petitioners' claims about denial of counsel, constitutional questions, and the testimony of Walter Boyle are not germane to the interpretation of the one clause in the real estate contract.

That clause was drafted by petitioners' attorney and was somewhat vague and ambiguous. The intent, as everyone admitted, was to permit the petitioners (who were the sellers under the real estate contract), if they desired, to take all or part of the purchase price, for the land they were selling, in the form of other property, to be exchanged with them, so as to postpone their liability for payment of any federal capital gains tax. The only issue was as to who had the obligation to select exchange property suitable to the petitioners, in the event petitioners decided to use that tax saving device. This was not even an issue until a few days before the closing, when petitioners came up with an argument, in an attempt to avoid their obligation under the contract, that it was the job of the respondents herein to select such property, suitable to petitioners.

The position of the respondents, however, was that if

petitioners wanted to receive exchange property, a procedure which was entirely for petitioners' benefit as a tax saving device, then petitioners themselves should select such property as would be suitable to them in an exchange. This position was never challenged by the petitioners until the last minute.

The testimony of Walter Boyle, while significant, *was only one small portion of all the evidence* at the trial which clearly revealed it was the duty of the petitioners to locate property suitable to themselves. As the decision of the Illinois Appellate Court states (see Appendix B to the Petition, p. App. 8):

> "There is no possible doubt under the evidence in this case that Mr. Byczynski knew he was to select property suitable to him for exchange purposes. He testified that in the course of his search he actually made offers for three different farms. His offers were rejected.
>
> Months later in September of 1965 the plaintiffs notified defendants they were exercising the option. Thereafter, on September 16, 1965, Mr. Byczynski met with representatives of the plaintiffs. At that meeting he complained that he was not given enough time to locate exchange property and asked for an extension to March 1, 1966.
>
> Since it is established without controversy that defendants were to select exchange property pursuant to their agreement and they acted upon that agreement in an effort to acquire it, it follows that the defense in this case, in which it is asserted that the plaintiffs were supposed to seek out and procure exchange property, was contrary to the facts."

Petitioners were not bothered by any constitutional questions—that argument is nothing more than an afterthought. The real problem encountered by petitioners was that the facts and the evidence were so clear against them.

Petitioners discuss the attorney-client privilege at con-

siderable length and go into detail as to the horrors which may arise where the privilege is not permitted.

However, petitioners have completely ignored the well-recognized exception to this privilege presented by our factual situation.

Initially, one notes, that since "the privilege tends to prevent a full disclosure of the truth, it should be strictly construed . . ." 97 C. J. S. Witnesses ¶ 276, p. 784. Then the privilege can only be claimed if the communication was confidential to begin with:

> "The privilege assumes, of course, that the communications are made with the intention of confidentiality." 8 Wigmore, Evidence ¶ 2311 (McNaughton rev. 1961).

In *Houdek* v. *Ehrenberger,* 397 Ill. 62, 72 N. E. 2d 837 (1947), it was said (p. 69):

> ". . . the communications . . . were not privileged because it does not appear they originated in a confidence that they would not be disclosed . . ."

There never was an intent that the conversation in question in this lawsuit be confidential. Walter Boyle talked to the representatives of the respondents herein when Boyle was drafting the contract clause for "suitable exchange property." In discussing how that clause would be used Boyle told the representatives of the respondents that he did not want anyone from the railroad or Jones & Laughlin going about negotiating for exchange property because this would only drive up and increase the prices for exchange property which would ultimately be charged against his clients. The agents for the respondents agreed to this. Boyle then talked to the petitioners and explained to them how the exchange property clause might save tax money for them and how that clause would work. He told petitioners that it was up to the property owners (here the

petitioners) to locate any exchange property, and they could go out and look for such exchange property without any interference from the railroad or Jones & Laughlin (A. 30, 31, 32).

This conversation explaining the agreement Boyle had reached with the representatives of respondents was not confidential and could not be subject to a claim of privilege. It was intended that the communication be disclosed. In this connection, the decision in *Dickerson* v. *Dickerson,* 322 Ill. 492, 153 N. E. 740 (1926) is most appropriate. In discussing circumstances similar to ours, that decision held (p. 501):

> "Obviously, where a transaction between attorney and client is of such a nature that a disclosure by the attorney is necessary to effectuate the intention of the client the transaction does not originate in a confidence that the transaction will not be disclosed, and the element of confidentiality is not essential to the full and satisfactory maintenance of the relation by the parties and is therefore not privileged."

Dickerson is a truly landmark case in this area of the law —not only in Illinois but throughout this country.

Dickerson was followed and reaffirmed by *Spencer* v. *Burns,* 413 Ill. 240, 108 N. E. 2d 413 (1952).

Most recently this question came up in the celebrated Illinois *Monier* decisions liberalizing discovery procedures. When that proceeding was before the Third District Illinois Appellate Court (*Monier* v. *Chamberlain,* 66 Ill. App. 2d 472, 213 N. E. 2d 425, 1966) that Court stated, p. 486:

> "Where, from the nature of the communication between client and attorney, and the purpose to be served by such communication it is evident that the parties intended such communication to be disclosed, no privilege against disclosure exists."

Thereafter that decision was affirmed by the Illinois Supreme Court, *Monier* v. *Chamberlain,* 35 Ill. 2d 351, 221 N. E. 2d 410 (1966), the Court stating (p. 358):

> "Under these circumstances, we believe that one of the essential conditions precedent to the attachment of the attorney-client privilege, *i.e.,* that the commnications must originate in a confidence that they will not be disclosed, cannot be said to exist."

Various federal courts have considered this same situation and consistently have held there is no privilege.

In re Ruos, 159 Fed. 252 (D. C. E. D. Pa., 1908), discussed two facets of the privilege claim, each of which are present in our case. At page 256, the court quoted Prof. Wigmore saying, "When the attorney is made a witness to attest the execution of a document (and not merely to draft it), there is no confidence contemplated, and therefore no privilege. . . ." At page 257, "An attorney called as a witness is bound to testify to any matters which came to his knowledge in any other way than through confidential communication from his client."

Walter Boyle signed the contract as a witness to the execution of the contract by petitioners (Pl. Ex. 4, A. 56, 58, R. 110). His testimony related to matters he first discussed and agreed upon with the employees of respondents and then repeated to petitioners (A. 30, 31, 32).

To the same effect, see Judge Wyzanski's holding in *United States* v. *United Shoe Machinery Corp.,* 89 F. Supp. 349, 359 (D. C. Mass., 1950) and Judge Kaufman's statement in *Comercio, et al.* v. *Dresser Industries, Inc., et al.,* 19 F. R. D. 513 (D. C. S. D. N. Y., 1956) at page 514,

> "The privilege should certainly not be extended to communications between an attorney and his client pertaining to the attorney's negotiations with a third party over terms and details of business transactions. See *Radio Corporation of America* v. *Rauland Corporation,* D. C. N. D. Ill., 1955, 18 F. R. D. 440."

II.

The Decision Below Is Correct.

The law of contracts is the law of our business community. In general, it is law based upon common sense and accepted principles of fair dealing in the particular factual situation facing the parties.

That is really all this lawsuit involved—the interpretation of a written promise by petitioners using common sense to consider the particular facts of the matter.

The Illinois Appellate Court found those facts were "established without controversy" and in favor of the respondents to this petition. On the one key issue in the controversy—who was to select suitable exchange property —the Court states:

> "There is no possible doubt under the evidence in this case that Mr. Byczynski knew he was to select property suitable to him for exchange purposes."

The Appellate Court correctly decided the matter following undisputed principles of Illinois law, as noted in ten decisions cited in their opinion.

CONCLUSION.

There is no constitutional issue here. Instead, the facts fall within a well recognized exception to a limited rule of privilege.

The Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

D. ROBERT THOMAS,
JAMES W. KISSEL,
11 South La Salle Street,
Chicago, Illinois 60603,
Attorneys for Respondents.

Of Counsel:
SIDLEY & AUSTIN,
11 South La Salle Street,
Chicago, Illinois 60603,
(ST 2-5400).